Consumer Class Actions: Perspectives and Strategies

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Consumer Class Actions

A Consumer Class Action Practitioner's Perspective

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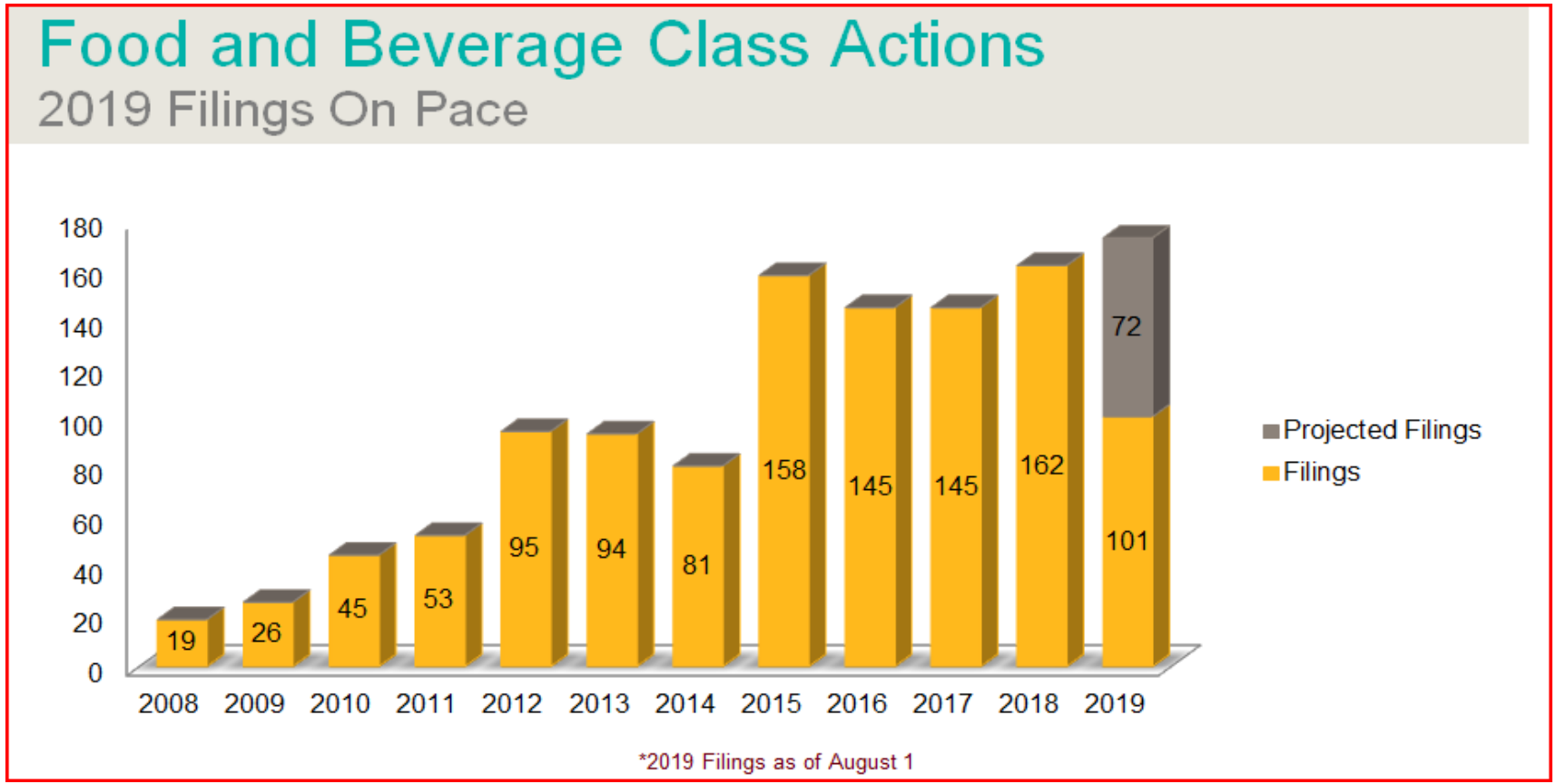
FILING HAVE CONTINUED A PACE



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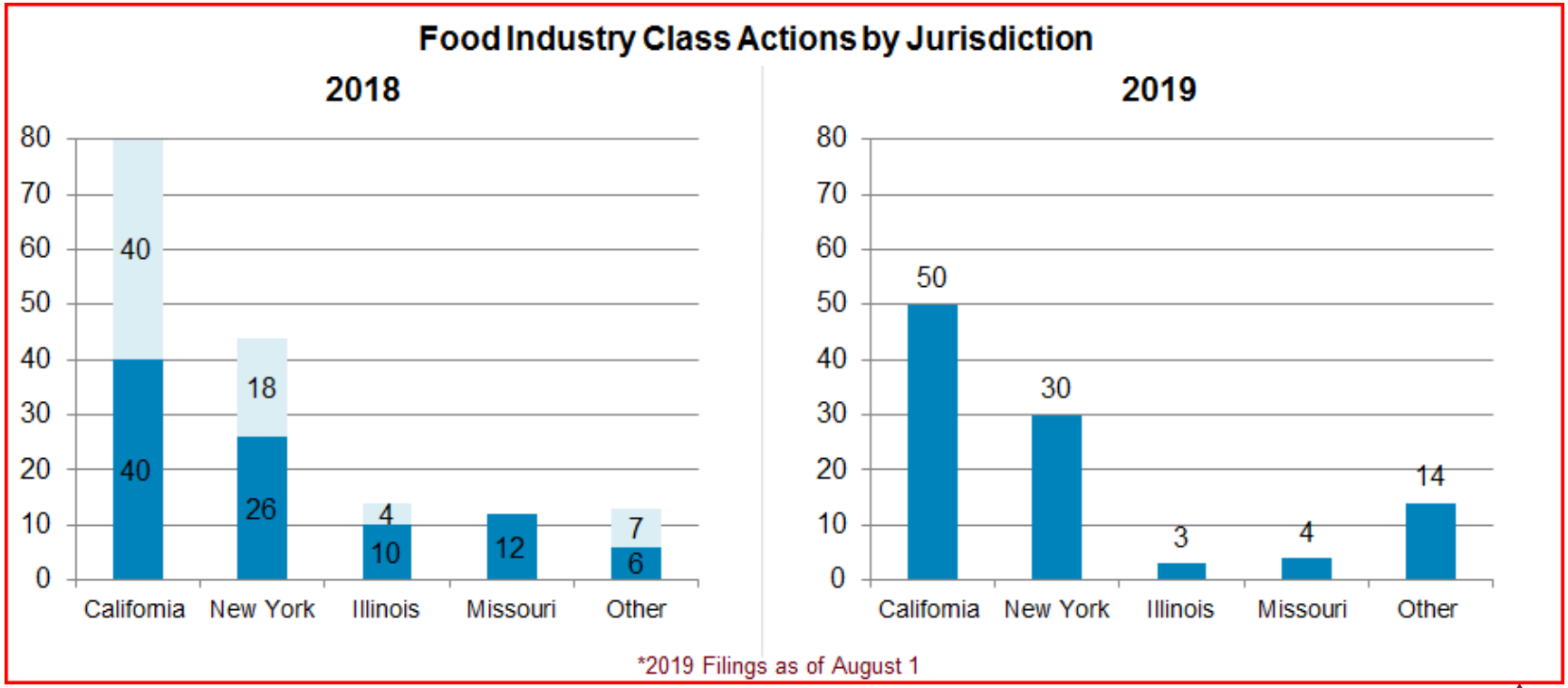
Food Industry Class Actions by Jurisdiction
2018
80
70
60
50
40
30
20
10
0
40
40
18
26
4
10
12
7
6
California
New York
Illinois
Missouri
Other
2019
80
70
60
50
40
30
20
10
0
50
30
3
4
14
California
New York
Illinois
Missouri
Other
*2019 Filings as of August 1

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FILINGS ARE JUST THE TIP OF THE ICEBERG

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MANY CASES RESOLVE PRE-SUIT

California Civil Code 1782:
(a) Thirty days or more prior to the commencement of an action for damages pursuant to this title, the consumer shall do the following:
(1) Notify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770.
(2) Demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770. The notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred or to the person's principal place of business within California.
(b) Except as provided in subdivision (c), no action for damages may be maintained under Section 1780 if an appropriate correction, repair, replacement, or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of the notice.

Massachusetts Chapter 93A Section 9(3) At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent. Any person receiving such a demand for relief who, within thirty days of the mailing or delivery of the demand for relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning its rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner. In all other cases, if the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two. For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of the existence or nonexistence of insurance coverage available in payment of the claim.

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The Pre-Suit Requirement is Strict

See e.g. Benson v. Southern California Auto Sales, Inc., 239 Cal. App. 4th 1198 (2015)(holding that a plaintiff cannot maintain a suit for damages if the defendant appropriate and timely correction offer under the California consumer legal remedies act)

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Pre-Suit Requirement - A Few Approaches.

Approach #1

File First and Then Amend

- California law approves of that procedure where a plaintiff raises only a demand for injunctive relief under the CLRA in an initial pleading, and then later sends a demand letter before filing an amended complaint adding a claim for money damages. *Morgan v. AT &T Wireless Servs.,* 177 Cal. App. 4th 1235, 1260 (2009) (stating that "the statute expressly allows such an amendment, as long as it is done 30 days or more after filing of the original complaint and compliance with the notice requirement") (citing Cal. Civ. Code §1782(d)).

Pre-Suit Requirement
-A Few Approaches

Approach #2

Serve First (without filing)

and Then Have a Discussion

"…We contacted 22 major food companies in order to better characterize the consumer experience in attempting to obtain clear information about sesame. Fourteen of the 22 (64 percent) have shown leadership on sesame by declaring sesame ingredients and addressing cross-contact risks. These leading companies can serve as "seeds of change" for the rest of the food industry…" *Seeds of Change*, Center for Science in the Public Interest (April 2018)

The State of Natural

STATE OF NATURAL CASES

Although filings slowed down when the FDA announced it was working on a definition of "natural," these cases have RESURGED recently

Represent around 20% of the suits filed

Claims Focus on Use of Synthetic/Multi-function and Highly Processed Ingredients and GMOs

- *Nelson v. The Coca-Cola Co.* (SD Cal.)("natural" soda contained citric/ascorbic acids & caramel color)
- *Rice v. National Beverage Corp.* (N.D. Illinois)("100 percent natural" LaCroix contains several synthetic compounds)
- *Cunningham v. Pret-A-Manger*, (S.D.N.Y.)("natural" sandwiches and other food products)
- *Forsher v. Boar's Head* (N.D. Cal.)(cheese products can't be "natural" when they're derived from cows raised on GMO feed)
- *Schneider v. Chipotle* (N.D. Cal.)(food made with only "non-GMO" ingredients is false because meat and dairy products were derived from animals that had eaten genetically modified feed)

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If a label contains the words “natural” one need to determine:

(1) what is each ingredient’s purpose and
(2) whether it’s synthetic or can be used as an artificial flavor or preservative
(3) What manufacturing process did the ingredients have to go through
(4) Are the ingredients derived from GMOs
(5) Do the ingredients meet the standard for organic

- IF IN DOUBT, LEAVE IT OUT -

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Questions or Comments?

Please free to contact me at:

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The "Reasonable Consumer" Standard and How It Is Empirically Tested in Food Class Actions

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Basis for the "Reasonable Consumer" Standard

Advertising litigation

- The **FDCA** provides that "[a] food shall be deemed to be **misbranded**…[i]f…its labeling is false or misleading in any particular." 21 U.S.C. § 343(a).

FDCA

- Lacking an FDCA standard for misleading branding, **courts** have generally evaluated allegations of unfair competition and violations of consumer protection statutes under a **reasonable consumer standard** and found that it is not inconsistent with FDCA regulations. Lima et al v. Post (D. Mass. Aug. 13, 2019)

- Most such laws point to labels/ads that would mislead (a significant proportion of) ordinary consumers acting reasonably in the circumstances.

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Applying the reasonable consumer test

- Objective test
- In the context of the surrounding words and label as a whole
  - Implausible definitions or interpretations of terms (“CrunchBerries”)
  - Impression of front label differs from ingredient list (healthy + sugar)
  - Disclaimers or clarifying information on the package (beer origin)
  - Commonly understood packaging (slack fill)

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What is the Role of the Ingredients List?

Reasonable Consumer Standard

- Recent cases have focused on packages with allegedly deceptive front labels but with additional relevant information on list of ingredients shown on the side of the package (e.g. *Mantikas v. Kellogg*)
- Are consumers expected to read the Nutrition Panel and ingredient list?
- Can the Nutrition Panel or ingredient list cure problems with the front label?

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Standard in the Second Circuit?

Reasonable Consumer Standard

- In *Mantikas v. Kellogg* (2nd Cir., Dec. 11, 2018):
  - Front label (large print): "Made With Whole Grain" or "Whole Grain"
  - Front label (small print): "Made with X g of Whole Grain per Serving" (8 g or 5 g)
  - Ingredient list: "enriched white flour" as first ingredient, "whole wheat flower" as second or third ingredient; 26 g servings
- The Court found that "reasonable consumers should not be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box."

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Or Tension in the Second Circuit?

Reasonable Consumer Standard

- In *Jessani v. Monini* (2nd Cir., Dec. 3, 2018):
  - Front label: "White Truffle: (large), "Flavored" (small), "Extra Virgin Olive Oil" (large)
  - Front label: Image of an actual truffle
  - Ingredient list: No "truffle" ingredient listed
- The Court found "it simply not plausible that a significant portion of the…public acting reasonably would conclude" that the product was made with actual truffles—"particularly…given that the product's ingredient list contains no reference to the word 'truffle'…"

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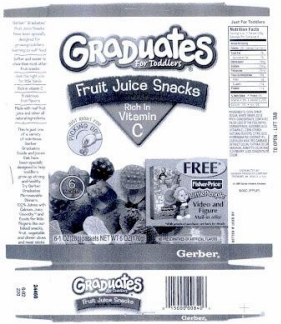
Differing Views in Other Courts

Reasonable Consumer Standard



- *Williams v. Gerber* (9th Cir., 2008)

  "We disagree with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box."

- *In re 100% Grated Parmesan Cheese Mktg. & Sales Prac.* (N.D.IL., 2017)

  "While a reasonable consumer, lulled into a false sense of security by an unavoidable interpretation of an allegedly deceptive statement, may rely upon it without further investigation, consumers who interpret ambiguous statements in an unnatural or debatable manner do so unreasonably if an ingredient label would set them straight."

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Reasonable Consumer Standard Can Affect Class Certification

- Permissive "reasonable consumer" standards allow actions with broader classes to survive motions to dismiss
- Permissive "reasonable consumer" standards at the pleading stage may allow classes with more heterogeneous members
  - Consumers with multiple reasons for purchasing
  - Multiple types of reasonable consumers
  - Predominance?
- This could also affect merits (reliance) and damages (causation)
  - California UCL requires actual reliance, NY and FL statutes do not
  - "Price premium," "full refund," and "unjust enrichment" are the most commonly-asserted damages theories

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Surveys Can Gauge Behavior of "Reasonable Consumers"

- For class actions that survive motions to dismiss, survey evidence often becomes a central focus
- Consumer surveys can delve deeper into how ordinary consumers interpret product labels
- Experts may use published third-party surveys, ordinary course of business surveys, or surveys commissioned during litigation
    - Usual approach is a conjoint analysis
    - Surveys are most commonly used at post-pleading stages
    - Some exceptions (Becerra v. Dr. Pepper; 100% Grated Parmesan)

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Do "Reasonable Consumers" Read Ingredient Lists?

1 of 2

- FDA's Health and Diet Survey (2014): 68% of consumer respondents said they "often" or "sometimes" look at food labels to "see if something said in advertising or on the package is actually true."
- C+R Research survey (2016): "Nearly three-quarters of consumers are reading the labels on their food, and over one-quarter do so with almost every item they buy"
- OnePoll 2018 survey: 77% of Americans read food labels when purchasing products.

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Do "Reasonable Consumers" Read Ingredient Lists?

2 of 2

- Int'l Food Information Council Foundation 2018 survey: over half of consumers consult the ingredient list "often" or "always" when making purchases. A similar proportion consult the NFP.
- Survey commissioned by Beneo (2018): "ingredients lists are powerful purchasing motivators"—they "trump[] both the brand and product description in motivating purchase."

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Natural Experiments Can Gauge "Reasonable Consumers"

- Because a plaintiff in a false advertising case has necessarily become aware of the alleged misrepresentations, "there is no danger that they will again be deceived by them." (*Elkind v. Revlon*, E.D.N.Y, 2015)
- Do named plaintiffs continue to purchase the products at issue?
  - Food & beverage consumers tend to be repeat purchasers
  - Consumers gain experience with their purchased products
  - Do not expect repeat purchasing if consumers are not satisfied
- This "natural experiment" may shed light on the alleged deception
- Other "natural experiments": label changes during relevant period

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Questions?

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Consumer Class Actions Challenging Multi-Purpose Ingredients and Supplements

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The Multi-Purpose Ingredient Theory

- This consumer deception theory challenges food products that are usually positioned as better-for-you via label claims such as:
  - No artificial flavors
  - No preservatives
  - No artificial preservatives
- Where the food contains (and declares in the ingredient list) the presence of an ingredient, and the ingredient has multiple possible functions in food, but may be in the food for only one of its recognized functions
- And where one of the functions—though not necessarily the function in this particular food—is the thing that the label claims the food does not have
  - Oftentimes combined with allegations that FDA agrees the ingredient can serve that purpose
  - Sometimes combined with allegations that the manufacturer agrees, too
- Oftentimes combined with misbranding allegations, e.g., mandatory federal and state food label disclosures are missing (disclosure of flavors and preservatives), failure to follow 21 CFR 101.22 definitions of artificial flavor or chemical preservative

Ingredients Challenged

- Calcium silicate (preservative)
- Citric acid (preservative, flavor)
- Dextrose (flavor)
- Disodium inosinate (flavor)
- Fumaric acid (flavor)
- Guanylate (flavor)
- Lactic acid (flavor)
- Malic acid (flavor)
- Maltodextrin (flavor)
- Monosodium glutamate ("MSG") (flavor)
- Phosphoric acid (preservative, flavor)
- Potassium chloride (flavor)
- Powdered cellulose (preservative)
- Sodium diacetate (flavor)
- Xanthan gum (preservative)

In re: Coca-Cola Products Marketing And Sales Practices Litigation (No. II), No. 4:14-md-02555-JSW (N.D. Cal.) [*see also Lazaroff v. Coca-Cola*, No. 1:14cv1763 (E.D.N.Y.)]

- "Original formula" Coca-Cola (now called "original flavor")
- Allegedly positioned as "natural and healthy" via the "Pemberton" statement:

"no artificial flavors. no preservatives added. since 1886."

(apparently statement no longer in-market)

- Product contains phosphoric acid, which is alleged to be both an artificial flavor and chemical preservative, as prior versions of Coke's website allegedly supported
- Several cases filed in 2013 & 2014; MDL transfer order issued in 2014
- Plaintiffs survived motion to dismiss (9th Cir. did not accept Coke's certified interlocutory request for review of MTD decision)
- Coke's motion for partial summary judgment denied
- Plaintiffs filed class certification motion for injunctive relief only; no damages sought. Fully briefed as of 8/3/2017, and under submission awaiting decision

In re: Coca-Cola Products Marketing And Sales Practices Litigation (No. II), No. 4:14-md-02555-JSW (N.D. Cal.)

September 3, 2008 statement from Coke's CFO:

> "North America, it's the one last market we really need to turnaround. We acknowledge it but ***we've got some very good plans to do that***. We think ***we know what we need to do***. We needed to ***fix our marketing*** and we think we've done that. We've got ***very good marketing*** in the US now. We've started what we call Project Pemberton. This is about sparkling beverages. It will be print. You'll see it soon. It will be print but it's actually re-educating the consumer, and I don't know that you can read what it says there but it says "No preservatives added, no artificial flavors since 1886. Never has, never will". And if you think about the new teenagers today and young adults as they've grown up and there's just an explosion of choices they didn't grow up with their limited choices like I did and maybe they've forgotten that Coke actually was born in 1886 and there weren't artificial ingredients back then. This is all pretty natural stuff and we're just – to remind people."

Amended Consolidated Complaint (Doc. 79), ¶ 19 (emphasis added)

The Citric Acid Cases

- ***Theory of deception***: product labeled as containing no preservatives or no artificial preservatives, but the product contains citric acid, a recognized preservative
- A handful filed in 2012-2014
- At least 42 filed since 2016
- At least 9 filed so far in 2019
- Likely many more pre-litigation demand letters

The Malic Acid Cases

- ***Theory of deception***: product labeled as containing no artificial flavors, or label does not declare the presence of an artificial flavor, but the product contains malic acid, a recognized flavor
- At least 26 filed since 2017
- Likely many more pre-litigation demand letters
- Almost perfect record for plaintiffs on motions to dismiss challenging the general theory of deception (but see ultimate result in Sunny Delight)
- At least one class certified in part (Ocean Spray), with one additional class cert motion filed (Hershey)
- Rule 11 sanctions against Ron Marron (Sunny Delight)

Defenses [*see, e.g.*, No. 5:18cv668, Doc 20 (C.D. Cal.); No. 4:17cv33, Doc 28 (WD Mo.)]

- FDA recognizes multi-function ingredients and allows label claims that feature an ingredient and focus on the function that the ingredient has in the food
- An ingredient must be labeled as a flavor or a preservative only if it meets the definition of a flavor or preservative, and functions as that, in the food
- The presence of a flavor need be disclosed on PDP only in certain circumstances (e.g., simulates primary recognizable flavor)
- Challenged ingredient may be in food for no purpose – it might have served a purpose at an upstream stage, but has no function in the finished product
- All of this can support express or implied federal preemption arguments
- USDA pre-approves labels for food that would be subject to same allegations (dispositive for USDA-regulated products; good atmospheric for FDA-regulated products)
- Consumers don't think like FDA and don't miss what they don't know to expect – e.g., if consumers are not aware of the regs requiring disclosure of flavors, they aren't deceived by no disclosure (won't work if product says "no artificial flavors")
- Product delivers what a consumer is looking for in a "no preservatives" product

Recent Developments in Supplement Class Actions

- ***Sonner v. Schwabe North America, Inc.***, 911 F.3d 989 (2018) (summary judgment for defendant reversed; plaintiff challenged label statements that Ginko biloba is capable of improving cognitive functions; the district court granted summary judgment in defendant's favor, ruling that a battle of the parties' experts prevented plaintiff from meeting her burden at trial on the false advertising claims; Ninth Cir. ruled that because plaintiff came forward with evidence demonstrating a genuine dispute of material fact (i.e., expert testimony and other scientific data that Ginko biloba does not improve cognitive functions), she "easily met her burden" to successfully oppose summary judgment; it was error for the district court to require plaintiff to disprove the possibility that defendant's products provided the labeled benefits)
- ***Brady v. Bayer Corp***., 26 Cal.App.5th 1156 (2018) (theory that "One A Day" brand name was deceptive regarding gummies that have a 2-gummies-per-day serving instruction on back is legally viable under Cal's UCL, FAL and CLRA; decision expressly disagrees with federal decisions that go the opposite way on the exact question)

Recent Developments in Supplement Class Actions (con't)

- ***Dachauer v. NBTY, Inc.***, 913 F. 3d 844 (9th Cir. 2019) (summary judgment for defendant affirmed based on FDCA preemption of challenges to label statements that vitamin E supplements promoted cardiovascular and immune health)
- ***Anthony v. Pharmavite, LLC***, 2019 WL 109446, No. 18cv02636 (N.D. Cal. Jan. 4, 2019) (representations that biotin helps hair, skin and nails were alleged to be false because biotin "will not provide any benefits" *to the general population*; court granted motion to dismiss on Fed. R. Civ. P. 9(b) grounds; amended complaint filed and answered)
- ***Cabrera v. Bayer Healthcare, LLC***, 2019 WL 1146828, No. 2:17cv8525 (C.D. Cal. Mar. 6, 2019) (motion to dismiss denied as to complaint alleging that calling a multivitamin "complete" was false and misleading because the product did not contain all the vitamins that FDA deems essential)

Recent Developments in Supplement Class Actions (con't)

- ***Farar v. Bayer AG***, No. 3:14-cv-04601 (N.D. Cal.) (jury verdict and March 7, 2019 judgment in favor of defendant on challenges to label statements that vitamins support heart health, immunity and physical energy; not false or misleading)
- ***Kroessler v. CVS Health Corp.,*** 387 F. Supp. 3d 1064 (S.D. Cal. 2019) (challenges to claims that glucosamine helps with joint pain, flexibility and mobility were preempted by FDCA/NLEA; "Plaintiff's citation to studies does not equate to defendant lacking competent and reliable scientific evidence of its own that establishes the necessary substantiation;" "Furthermore, California law does not allow private plaintiffs to demand substantiation for advertising claims")
- ***Greenberg v. Target Corp.***, 2019 WL 4182729, No. 3:17cv1862 (N.D. Cal. Aug. 29, 2019) (summary judgment for defendant; preemption as to claims seeking substantiation for Biotin structure-function claims; on appeal)

Whole Grain, Butter, Cocoa, White Chocolate, Sugar and Honey, with a dash of Vanilla

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Made with Whole Grain

Mantikas v. Kellogg Co., 910 F. 3d 633 (2d Cir. 2018) (Whole Grain Cheez-It)

- Second Circuit reversed dismissal of a lawsuit alleging that Kellogg misleads consumers by marketing Cheez-Its as "***made with whole grain***" when product contains other grains
- Lower court agreed with Kellogg that the "made with whole grain" label was factually accurate and was not misleading (the product *does* contain whole grain and made no specific representations about the predominance vis-à-vis other ingredients)
- Second Circuit ruled that
  - "Plaintiffs' core allegation is that the statements 'Whole Grain' and 'Made With Whole Grain' are misleading because they communicate to the reasonable consumer that the grain in the product is predominantly, if not entirely, whole grain."
  - The primary ingredient of Whole Grain Cheez-Its was enriched white flour, with whole grain flour appearing as second or third on the ingredients list.
  - Although the Nutrition Facts panel clarified that a serving was 29 grams and the whole grain content was between five and eight grams per serving, "we cannot conclude that these disclosures on the side of the box render Plaintiffs' allegations of deception implausible."
  - "[A] reasonable consumer should not be expected to consult the Nutrition Facts panel on the side of the box to correct misleading information set forth in large bold type on the front of the box. Plaintiffs plausibly allege that the Nutrition Facts panel and ingredients list on whole grain Cheez-Its—which reveals that enriched white flour is the predominant ingredient—contradict, rather than confirm, Defendant's 'whole grain' representations on the front of the box."

Made with Real Butter

- ***Theory***: food labeled as containing real butter, which it does, but it also contains margarine and other oils/fats, sometimes in an amount greater than butter
- ***Several cases filed***:
  - *Gibbs v. Pepperidge Farm, Inc.*, No. 1:18cv7411 (E.D.N.Y)
  - *Berger v. MFI Corp.*, No. 2:17cv6728 (E.D.N.Y)
  - *Leguette v. Schwans Co.*, No. 1:17cv7599 (E.D.N.Y.)
  - *Louis v. Stop & Shop Supermarket Co.*, No. 1:18cv2221 (E.D.N.Y.)
  - *Reyes v. Crystal Farms Refrigerated Dist. Co.*, No. 1:18cv2250 (E.D.N.Y.)
  - *Sarr v. BEF Foods, Inc.*, No. 1:18cv6409 (E.D.N.Y.)

Made with Real Cocoa

- ***Theory***: food claims to contain "real cocoa," but cocoa processed with alkali is not "real" cocoa
- ***Several cases filed:***
  - ***Lopez v. SPC Management***, No. 2:19cv1875 (E.D.N.Y.) (Voortman cookies)
  - ***Lopez v. General Mills Sales***, No. 2:19cv1841 (E.D.N.Y.) (breakfast cereal)
  - ***Harris v. Mondelēz Global LLC***, No. 1:19cv2249 (E.D.N.Y.) (Oreo cookies)
  - ***Copeland v. Post Consumer Brands LLC***, No. 2:19cv2488 (E.D.N.Y.) (breakfast cereal)
  - ***Harper v. Mondelēz International, Inc.***, No. 4:19cv2865 (N.D. Cal.) (Oreo cookies)
  - ***Harper v. General Mills, Inc.***, No. 4:19cv2747 (N.D. Cal.) (Breakfast cereal)

White Chocolate

- ***Theory:*** food labeled as containing white chocolate, but food is merely flavored to taste like white chocolate and does not contain cocoa butter
- ***Several cases filed:***
  - ***Rivas v. The Hershey Company***, No. 1:19cv3379 (E.D.N.Y.) (Kit Kat candy bars)
  - ***Morrison v. Snack Innovations, Inc.***, No. 1:19cv1238 (S.D.N.Y.) (Drizzilicious snacks)
  - ***Morrison v. Nuts 'n More LLC***, No. 1:18cv11192 (S.D.N.Y.) (white chocolate peanut spread)
  - ***Marten v. Starbucks Corp.***, No. 1:18cv9201 (S.D.N.Y.) (toasted white chocolate frappuccino)
  - ***Ruiz v. Living Intentions LLC***, No. 1:18cv9200 (S.D.N.Y.) (white chocolate superfood nut blend)
  - ***Joslin v. Clif Bar & Company***, No. 4:18cv4941 (N.D. Cal.) (white chocolate snack bars) motion to dismiss granted 8/26/2019; amended complaint filed 9/9/2019
  - ***Winston v. The Hershey Company***, No. 1:19cv3735 (E.D.N.Y.) (Reese's "white" peanut butter cups)
- Likely many more pre-litigation demand letters outstanding

Sugar

- ***Theory:*** food positioned as better-for-you with various health and wellness label claims, but contains excess added sugar, which is unhealthy and toxic
- Several cases filed in the past 3 years against breakfast and other products. So far, ***very mixed results***, but, stay tuned; lots to come on these cases including more motions to dismiss, class cert. motions, and at least 2 pending appeals:
  - ***Hadley v. Kellogg Sales***, No. 5:16cv4955 (N.D. Cal.) (cereal).
  - ***Krommenhock v. Post Foods***, No. 3:16-cv-04958 (N.D. Cal.) (cereal).
  - ***Truxel v. General Mills***, No. 4:16cv4957 (N.D. Cal.) (cereal) (judgment for defs; on appeal)
  - ***Digregorio v. Kellogg Sales***, No. 3:19cv632 (N.D.N.Y.) (cereal)
  - ***Amaya v. Dole Packaged Foods***, 3:19cv7734 (C.D. Cal.) (fruit & oatmeal, parfait) (voluntary dismissal without prejudice)
  - ***McMorrow v. Mondelēz***, No. 3:17cv2327 (S.D. Cal.) (beVita breakfast products)
  - ***Milan v. Clif Bar***, No. 3:18-cv-02354 (N.D. Cal.) (snack bars)
  - ***Clark v. Perfect Bar***, No. 3:18cv6006 (N.D. Cal.) (snack bars) (judgment for defs; on appeal)

Honey

- ***Theory:*** honey featured in the product name and/or via a label image or claim misleads consumers into thinking honey is the primary, a significant or the only sweetener, but there are other sweeteners that are unhealthy
- ***Several cases filed:***
  - ***Lima v. Post Consumer Brands, LLC,*** No. 1:18-cv-12100, 2019 WL 3802885 (D. Mass.) – Case dismissed (motion for reconsideration filed; appeal to be filed if not successful): "Plaintiffs have not plausibly alleged any claim" and "under the reasonable consumer standard, a consumer could not reasonably have concluded that Honey Bunches of Oats was primarily sweetened with honey based on Post's use of the word 'honey' and the related graphics appearing on the box."
  - ***Lima v. Trader Joe's Co.***, No. 1:18cv12591(D. Mass.) – Case on hold pending Honey Bunch of Oats case.
  - ***Ryan v. Trader Joe's Co.***, 2:18cv10451 (C.D. Cal.) (voluntary dismissal without prejudice)
  - ***Tucker v. Post Consumer Brands***, No. 4:19cv03993 (N.D. Cal.)

Vanilla

- ***Theory:*** food labeled as "vanilla" without disclosing on the PDP that it is a flavored food, where vanilla taste does not come solely from vanilla beans or vanilla extract
- ***Several cases*** (15 pending actions and counting):
  - ***Lopez v. SPC Management Co., Inc.***, No. 2:19cv1875 (E.D.N.Y.) (Voortman Cookies)
  - ***Sharpe v. A&W Concentrate Company and Keurig Dr Pepper Inc***., No. 1:19cv768 (E.D.N.Y.) (Root Beer and Cream Soda)
  - ***Andriulli v. Danone North America, LLC***, No. 7:19cv5165 (S.D.N.Y.) (Oikos and Dannon yogurt)
  - ***Garadi v. Mars Wrigley Confectionery US, LLC***, No. 1:19cv3209 (E.D.N.Y.) (Dove ice cream bars)
  - ***Derchin v. Unilever United States, Inc***., No. 1:19cv3543 (E.D.N.Y.) (Breyers ice cream)
  - ***Liou v. Nestlé Dreyer's Ice Cream Company***, No. 1:19cv5762 (S.D.N.Y.) (Dreyer's/Edy's ice cream
  - ***Dalton v. Mott's LLP***, No. 1:19cv2960 (E.D.N.Y.) (Stewart's Fountain Classics carbonated beverages)
  - ***Haut v. Glanbia Performance Nutrition (Manufacturing), Inc.***, No. 1:19cv4566 (E.D.N.Y.) (Hot oatmeal cereal cups)
  - ***Kane v. Turkey Hill, L.P.***, No. 2:19cv4794 (E.D.N.Y.) (Turkey Hill "all natural" and "premium" ice cream lines)
  - ***Weber-Lugo v. Aldi Inc.***, No. 1:19cv4861 (E.D.N.Y.) (Belmont and Sundae Shoppe brands of ice cream)
  - ***Fields v. Friendly's Manufacturing and Retail, LLC***, No. 1:19cv4924 (E.D.N.Y.) (Friendly brand ice cream products)
  - ***Clarke v. Tillamook County Creamery Association***, No. 7:19cv8207 (S.D.N.Y.) (Tillamook brand ice cream products)
  - ***Musikar v. Cumberland Farms, Inc.***, No. 7:19cv8410 (S.D.N.Y.) (Farmhouse Creamery Deluxe vanilla ice cream)
  - ***Trust v. Silk Operating Co., LLC***, No. 7:19cv8442 (S.D.N.Y.) (Silk almondmilk)
  - ***Varelli v. Blue Diamond Growers***, No. 1:19cv5259 (E.D.N.Y.) (Almond Breeze almondmilk)